

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Golden Coach, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Franchise Tax on :
Business Corporations under Article 9A of the Tax :
Law for the Fiscal Years Ended 2/28/79-2/28/81. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Golden Coach, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Golden Coach, Inc.
111 Main St.
East Rockaway, NY 11518

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
7th day of November, 1985.

David Parchuck

Conrad A. Shapiro
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Golden Coach, Inc.

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Franchise Tax on :
Business Corporations under Article 9A of the Tax :
Law for the Fiscal Years Ended 2/28/79-2/28/81. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Meyer Zimmerman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Meyer Zimmerman
1956 Lake End Rd.
Merrick, NY 11566

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
7th day of November, 1985.

David Parchuck

James R. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 7, 1985

Golden Coach, Inc.
111 Main St.
East Rockaway, NY 11518

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Meyer Zimmerman
1956 Lake End Rd.
Merrick, NY 11566
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
GOLDEN COACH, INC. : DECISION
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Fiscal :
Years Ended February 28, 1979, February 29, 1980 :
and February 28, 1981. :

Petitioner, Golden Coach, Inc., 111 Main Street, East Rockaway, New York 11518, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended February 28, 1979, February 29, 1980 and February 28, 1981 (File No. 40681).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 5, 1985 at 1:15 P.M., with all briefs to be submitted by June 26, 1985. Petitioner appeared by Meyer Zimmerman, CPA. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly relied upon a sales tax assessment against petitioner in calculating franchise tax deficiencies for corresponding periods.

FINDINGS OF FACT

1. On December 13, 1982, the Audit Division issued to petitioner, Golden Coach, Inc., three notices of deficiency, asserting additional franchise tax due under Article 9-A of the Tax Law for the fiscal years ended February 28,

1979, February 29, 1980 and February 28, 1981 in the respective amounts of \$315.07, \$1,766.80 and \$439.55, plus interest and negligence penalties pursuant to section 1085(b) of the Tax Law.

2. Petitioner operates a diner in East Rockaway, New York. Petitioner commenced serving beer to patrons in December, 1980 but serves no liquor.

3. The franchise tax deficiencies under consideration in this proceeding ensued from a sales tax examination, during the course of which petitioner's sales and use tax returns for the period June 1, 1978 through February 28, 1981 were reviewed.

The sales tax examiner compared petitioner's gross sales as reflected in its federal corporation income tax returns, sales and use tax returns and books of original entry and found the amounts were in substantial agreement. He also reconciled petitioner's purchases per its books and per its federal returns.

Petitioner furnished its customers with guest checks and rang sales on cash registers which produced tapes. These guest checks and register tapes were discarded, however, after a principal of the corporation recorded sales in the day book. Subsequent to the commencement of the sales tax audit, petitioner retained guest checks and tapes for the then current period.

The examiner calculated petitioner's overall markup as 124 percent, by reference to the federal returns. He deemed this percentage low for the industry and communicated his opinion to petitioner's independent accountant. The examiner and petitioner's accountant thereafter engaged in negotiations which culminated in their agreement that food purchases (reduced by an allowance for employee meals) would be marked up by 142 percent and beer purchases, by 230 percent. The examiner did not perform markup testing: he did not review costs and selling prices to determine the actual markup of selected items. The

examiner's arithmetical steps in arriving at audited taxable sales are summarized below.

Audited taxable food sales	
food purchases	\$ 484,699
less: employee meals	<u>(19,784)</u>
adjusted food purchases	\$ 464,915
markup 142%	<u>660,179</u>
audited food sales	\$1,125,094
 Audited taxable beer sales	
beer purchases	\$ 260
markup 230%	<u>598</u>
audited beer sales	\$ 858
 Additional taxable sales and sales tax	
audited food and beer sales	\$1,125,952
reported taxable sales	<u>1,085,508</u>
additional taxable sales	\$ 40,444
 sales tax	\$ 2,831.08

The examiner then apportioned the \$40,444 in additional taxable sales to the quarterly periods under audit (by some formula which the record does not disclose).

Weighing the amount of the proposed assessment against the expense of pursuing a protest, petitioner consented to the assessment. In his report, the examiner made an annotation to signify that petitioner's gross sales had been increased by a figure in excess of \$10,000.00 per year; it was his understanding that the annotation would initiate a review of the report for the purpose of determining whether an income tax or franchise tax examination was warranted. Petitioner was not advised of the possibility that the sales tax assessment might form the basis for an income tax or franchise tax deficiency.

4. The franchise tax deficiencies were predicated on two adjustments: additional income as allegedly disclosed by the sales tax examination, and the disallowance of wage expenses in the amount of \$10,124.00 for lack of substantiation.

	<u>FYE</u> <u>2/28/79</u>	<u>FYE</u> <u>2/29/80</u>	<u>FYE</u> <u>2/28/81</u>
Additional income	\$10,505	\$15,289	\$14,650
Disallowed wage expense	--	10,124	--
Total	\$10,505	\$25,413	\$14,650

The income tax examiner reviewed petitioner's general ledger, cash disbursements journal and deposits to business checking accounts for the fiscal year ended February 29, 1980. He discovered a discrepancy between petitioner's wage expenses for fiscal year 1980 as reflected in its general ledger and as deducted on its federal corporation income tax return. This discrepancy was apparently attributable to mathematical error.

The examiner accumulated the deposits to petitioner's checking accounts during fiscal year 1980 and added to this sum petitioner's cash business expenses to arrive at gross receipts.

Deposits to business checking accounts (net of sales tax and transfers)	\$319,269
Plus: cash business expenses	117,257
Less: net increase in accounts payable	(9,364)
Gross receipts	\$427,162
Gross receipts per return	(410,333)
Difference	\$ 16,829

According to the examiner's testimony, the gross receipts calculation was a "quick computation"; the gross receipts amount "was not an exact figure. There could have been an adjustment to that figure." Gross receipts could presumably have been adjusted upon petitioner's presentation of appropriate documentation, but the examiner did not offer his calculation to petitioner or petitioner's representative for review.

The examiner's cursory analysis of deposits was conducted to support his use of additional taxable sales as an increment to petitioner's entire net income, and not to form the basis of the asserted deficiencies. In a schedule attached to his report, the examiner stated:

"This analysis was completed for purpose of supporting audit adjustment. The unexplained amount is not being used as a basis for any adjustments and is an approximation because there was not enough audit time available to arrive at an exact figure."

CONCLUSIONS OF LAW

A. That the Tax Commission has previously decided that the results of a sales tax audit may properly be employed as a basis to assert an income tax deficiency; for example, a purchase markup analysis performed on the records of a sole proprietorship was considered an appropriate means of reconstructing the individual taxpayer's taxable income for purposes of Article 22 of the Tax Law. (Matter of William T. Kelly, State Tax Comm., December 31, 1984. See also Matter of Carmen and Adelia Garzia, State Tax Comm., June 29, 1983.) The cited cases differ from the matter at hand in one crucial respect: in the sales tax examination herein, the markup percentages applied to petitioner's purchases of food and beer were the product of negotiations between the examiner and petitioner's accountant, and were not computed by actually determining the difference between costs and selling prices. The use of these negotiated figures does not vitiate the sales tax assessment to which petitioner, after all, consented, but petitioner was not made aware of and clearly did not accede to their use for franchise tax purposes. Consequently, such figures standing alone cannot constitute a foundation for the franchise tax deficiencies asserted.¹

B. That the Audit Division's disallowance of wage expenses in direct reliance upon petitioner's general ledger must be sustained, in view of

1 An analysis was conducted of petitioner's bank deposits during fiscal year 1980. This analysis was extremely superficial and was not utilized in the computation of the deficiencies.

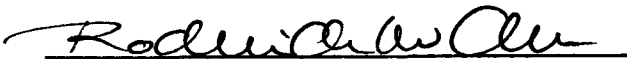
petitioner's failure to present any evidence to demonstrate that the adjustment was erroneous or improper.


C. That the petition of Golden Coach, Inc. is granted to the extent indicated in Conclusion of Law "A"; the notices of deficiency issued on December 13, 1982 are to be reduced accordingly; and except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER